

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
July 20, 2004 Session

**STATE OF TENNESSEE v. ERIC DEVON MCLEAN**

**Direct Appeal from the Circuit Court for Marshall County  
No. 15439 Charles Lee, Judge**

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**No. M2003-02238-CCA-R3-CD - Filed September 29, 2004**

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The appellant, Eric Devon McLean, was found guilty by a jury in the Marshall County Circuit Court of one count of aggravated assault. He received a sentence of five and one-half years in the Tennessee Department of Correction. On appeal, the appellant challenges the sufficiency of the evidence supporting his conviction and raises various sentencing issues. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ROBERT W. WEDEMEYER, JJ., joined.

Richard McGee, Nashville, Tennessee (at trial and on appeal), and James O. Martin, III, Nashville, Tennessee (on appeal), for the appellant, Eric Devon McLean.

Paul G. Summers, Attorney General and Reporter; Richard H. Dunavant, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

In the light most favorable to the State, the evidence adduced at trial revealed that on November 26, 2002, several residents of Lewisburg attended the Outer Limits Club in Nashville. Among the attendees were the victim in the instant case, Darren LaMont Porter; Maurice "Reece" Tyler; Kyra Carrouth; brothers Monty, Derrick, and Donathan Campbell; and Jeremy Horton and his roommate, Timmy "Jermaine" Cole, who were good friends with the Campbells. Porter said hello to Tyler as they watched a "hip hop contest" at the club. Later that evening, shooting erupted outside the club. During the shooting, Tyler shot and killed Monty Campbell and Kyra Carrouth.

The next day, Porter went to Horton's residence where he saw Horton, Cole, Derrick and Donathan Campbell, and the appellant. Porter discussed Monty Campbell's funeral arrangements with the appellant. Approximately two weeks later, Porter heard a rumor circulating through his neighborhood claiming that he had pointed out Monty Campbell to Tyler just prior to the November 25<sup>th</sup> shooting. Porter denied the truth of the rumor. Regardless, he feared for his safety and began carrying a handgun for protection. Additionally, Porter recalled that even though Derrick Campbell did not live in Porter's neighborhood, Campbell nevertheless began frequently driving past the duplex Porter shared with his mother. The duplex was located in the housing projects at 329 7<sup>th</sup> Avenue North in Lewisburg.

Thereafter, on January 1, 2003, Porter arrived home between 2:00 and 3:00 a.m. Porter was driving a 1998 silver Ford Escort which belonged to his then-girlfriend, Megan Farris. Porter had been driving the Escort for several weeks, and he opined that everyone in his neighborhood knew that he drove the car. After backing the Escort into the parking area in front of his duplex, he began gathering his belongings to exit the car. Porter looked up and saw the appellant and Derrick Campbell walking toward him from the house across the street. Porter could see the men clearly in the well-lit area, noticing the way their gold teeth glinted in the light from the streetlights as they smiled. Porter saw that the appellant held a handgun. Porter noticed the appellant "standing there locking and loading [the gun]," pulling back the slide on the automatic weapon. Porter crouched in the driver's seat then heard "the sound of bullets hitting. Like metal, like raining metal." Porter stated that several bullets hit the car near where he was sitting. The shots were heard by Porter's mother and by one of his neighbors.

After the shots stopped, Porter waited ten minutes before heading inside the duplex. Porter saw that his mother was asleep on the couch, and he went to his room and fell asleep, "[e]xhausted totally." The next morning, Porter's mother woke him to inform him that the Escort had been damaged during the night. Porter called Farris to tell her that her car had been damaged by gunfire. Farris instructed Porter to call police to report the damage. Porter did not want to involve police because he did not trust the authorities, nor did he believe that they could assist him in any way. Specifically, Porter explained,

When you are brought up from child hood, the police are your enemy. You know that because you have seen them take away friends and family. They have never done anything for me. Not that I had anything against the police. Everybody hates them until they need one. I have never needed their help, and they ain't never done anything for me.

However, Porter called police at Farris' insistence.

Soon after Porter's call, several officers arrived at the scene, including Officer Larry Hardin and Detective James Whitsett. Porter initially told police that he did not know who shot the Escort because he was sleeping inside the house at the time the incident took place. Police saw that bullets

had struck the duplex and Porter's car numerous times, including the front passenger seat of the car. They gathered shell casings, bullets, and bullet fragments from the duplex, the yard, the Escort, and the street in front of the Porters' home. The bullets and casings indicated that at least one 9 millimeter handgun and one .40 caliber handgun had been used during the shooting.

Later the same day, Porter spoke with his landlord, Jerry Freeman, who convinced Porter to speak more freely with police. Porter gave police a written statement saying that he saw Derrick Campbell and the appellant leaving the scene of the shooting; however, Porter failed to mention that he was in the car when the shooting occurred. Porter also claimed that he believed Derrick Campbell and the appellant were not the only people present during the shooting. Regardless, the only people he saw were the appellant and Derrick Campbell. Ultimately, Porter revealed to police that he was in the car during the shooting.

Shortly after Porter informed Detective Whitsett that the appellant and Derrick Campbell shot at his car, warrants were issued for their arrest. Later the same day, the appellant, after learning that police were looking for him, went to police headquarters. He was arrested, given Miranda warnings,<sup>1</sup> and questioned regarding the shooting of Porter's vehicle. The appellant denied his involvement, asserting that he was attending a New Year's Eve party at the home of Kim Maxwell at the time of the shooting. Derrick Campbell was also arrested on January 1, 2003. Both he and the appellant were incarcerated following their arrests.

Kim Maxwell and other attendees of her New Year's Eve party were questioned, and they recalled that the appellant and Derrick Campbell were at her house from approximately midnight until 3:00 a.m. However, they could not specifically account for the appellant's exact whereabouts during the entire night. Additionally, police discovered that Maxwell's house was located approximately one mile from Porter's duplex.

A few days following the January 1<sup>st</sup> shooting, Porter moved from the residence he shared with his mother to 340 Holly Grove Road in Lewisburg. On January 22, 2003, Porter was home with Farris and their young daughter. At 11:00 p.m., Porter and Farris heard several gunshots outside the house. Porter called police to report the incident. Police arrived and collected shell casings, bullets, and bullet fragments from around Porter's residence. As in the 7<sup>th</sup> Avenue shooting, there were both 9 millimeter and .40 caliber bullets.

Later in the evening on January 22, 2003, police obtained from a neighbor a "vague description" of a vehicle that was seen during the Holly Grove Road shooting. Police immediately began searching and found a vehicle matching the description at the residence of Jeremy Horton and Timmy Cole, which residence was located a quarter of a mile from Porter's Holly Grove Road residence. That night, after determining that Cole was the owner of the car, the police began watching the car and saw it leave the residence. They stopped the car and discovered that Cole, who had a suspended driver's license, was driving the car. Also in the car was Kenny Mayes, the brother

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<sup>1</sup> See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

of the appellant's girlfriend, Donna Mayes. Cole was arrested for driving on a suspended license, and the front compartment of the vehicle was searched. In the front of the vehicle, police discovered some marijuana. While searching the trunk of the vehicle, live .40 caliber ammunition, Winchester 9 millimeter ammunition, and 12-gauge shotgun shells were found. Additionally, police discovered a 9 millimeter High Point Arms semi-automatic handgun box and owner's manual. The gun was never recovered.

Detective Whitsett "ran an ATF trace" on the serial number found on the gun box and learned that the 9 millimeter High Point Arms semi-automatic handgun was originally sold on December 10, 2002, by David Jason Ray of Ray's Gun and Pawn to Jerry Jerome Whitsett. Detective Whitsett contacted Jerry Whitsett and learned that Whitsett had "traded the gun back to Ray's Gun & Pawn; and that he had qualified with the gun at a gun range." Whitsett explained that he had shot fifty rounds of ammunition from lane eight at Precision Firearms Training. The gun misfired once, so Whitsett traded the gun on December 16, 2002. Ray subsequently resold the gun on December 20, 2002, to Fred Levy Porter, Jr. On December 22, 2002, Jeremy Bullock bought the 9 millimeter High Point Arms semi-automatic handgun from Fred Porter, and sold the gun on December 27, 2002, to the appellant. Additionally, Bullock sold a box of Winchester 9 millimeter ammunition to the appellant, a box which shared similarities to the box of ammunition found in Cole's trunk on January 22, 2003.

The boxes of ammunition found in Cole's trunk were sent to the Tennessee Bureau of Investigation (TBI) crime laboratory to be tested for fingerprints. None of the identifiable prints on the boxes of ammunition belonged to the appellant. However, when the 9 millimeter High Point Arms semi-automatic handgun box was tested for fingerprints, three of the prints on the box matched the appellant's prints.

Testing was also done on spent ammunition gathered from lane eight of Precision Firearms Training. Additionally, shell casings, bullets, and bullet fragments gathered from the 7<sup>th</sup> Avenue shooting and the Holly Grove Road shooting were also sent to the TBI crime laboratory for testing. No recoverable fingerprints were found on the ammunition evidence. However, this result was expected because heat often destroys fingerprint evidence.

Agent Shelly Betts, a ballistics expert with the TBI crime laboratory, tested the bullets recovered from the three locations to determine from the "mechanical fingerprint" on the casings and bullets what weapon was used to fire the ammunition. Agent Betts examined a total of twenty-seven 9 millimeter bullets and four .40 caliber bullets from the 7<sup>th</sup> Avenue shooting. Agent Betts determined that at least four handguns, possibly as many as six handguns, were used during the 7<sup>th</sup> Avenue shooting.

From the Holly Grove Road shooting, Agent Betts examined a total of five 9 millimeter bullets and two .40 caliber bullets. She determined that only one 9 millimeter gun and only one .40 caliber gun were used during the Holly Grove Road shooting. Additionally, Agent Betts examined all of the bullets taken from lane eight of Precision Firearms Training. Agent Betts opined that

“[t]he five 9-millimeter [bullets] on Holly Grove Road, the 13 at the gun range, and those particular seven . . . from Seventh Avenue North . . . were all . . . fired through the same firearm.”

At the conclusion of the proof, the jury found the appellant guilty of aggravated assault.<sup>2</sup> The trial court sentenced the appellant as a standard Range I offender to five and one-half years incarceration. The trial court further ordered the appellant to serve the instant sentence consecutively to the sentence for which the appellant was serving probation at the time of the commission of the instant offense. The appellant now appeals the sufficiency of the evidence supporting his conviction and the correctness of his sentence.

## **II. Analysis**

### **A. Sufficiency of the Evidence**

On appeal, a jury conviction removes the presumption of the appellant’s innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury’s findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no “reasonable trier of fact” could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

In order to obtain the appellant’s conviction for aggravated assault, the State needed to prove that the appellant intentionally or knowingly assaulted Porter while using or displaying a deadly weapon. See Tenn. Code Ann. § 39-13-102(a)(1)(B) (2003). An assault is committed when the appellant “[i]ntentionally or knowingly caused another to reasonably fear imminent bodily injury.” Tenn. Code Ann. § 39-13-101(a)(2) (2003).

In the light most favorable to the State, the proof adduced at trial revealed that Porter was attempting to exit his car on 7<sup>th</sup> Avenue North in the early morning hours of January 1, 2003, when he saw the appellant and Derrick Campbell approach his car, holding firearms. The two men smiled

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<sup>2</sup> On count one of the indictment, the appellant was charged with attempted first degree murder and on count two the appellant was charged with aggravated assault. The appellant was found not guilty of attempted first degree murder, but the jury determined that the appellant was guilty of the lesser-included offense of reckless endangerment on count one. Additionally, the appellant was found guilty of aggravated assault on count two. Subsequently, the trial court merged the conviction for reckless endangerment on count one into the conviction for aggravated assault on count two. Accordingly, in the instant appeal, we will address only the conviction of aggravated assault.

before firing numerous times into the vehicle occupied by Porter. The area was well-lit, and Porter was able to clearly see his assailants. Porter testified that he was “[v]ery scared [and] terrified” during the shooting. Further, bullets struck the car near the area where Porter was sitting.

Additional proof indicated that the appellant purchased a 9 millimeter High Point Arms semi-automatic pistol shortly before the 7<sup>th</sup> Avenue shooting. Ballistics testing indicated that the same firearm that was purchased by the appellant had been used at a firing range prior to the 7<sup>th</sup> Avenue shooting and at the Holly Grove Road shooting which occurred twenty-two days following the 7<sup>th</sup> Avenue shooting. The appellant’s fingerprints were on the box which had once contained the firearm. Moreover, the proof showed that the appellant was close friends with Monty Campbell, who had been killed in a shooting in November. Rumors in the neighborhood where the appellant and Porter lived implicated Porter’s involvement in Monty Campbell’s death. We conclude that the foregoing evidence was sufficient to sustain the appellant’s conviction for aggravated assault.

## B. Sentencing

The appellant has specifically raised two issues regarding the correctness of his sentence. First, the appellant complains that he should have received some form of alternative sentencing. Second, the appellant contends that the trial court erred in ordering his sentence for the instant offense be served consecutively to a probationary sentence the appellant was serving at the time of the commission of the instant offense. We will address each of these issues in turn.

### 1. Alternative Sentencing

Regarding the appellant’s complaint that he should have received alternative sentencing, we recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (1997). Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant is a standard Range I offender convicted of a Class C felony sentenced to less than eight years incarceration; therefore, he is presumed to be a favorable candidate for alternative sentencing. However, this presumption may be rebutted by “evidence to the contrary.” State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute “evidence to the contrary”:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Zeolia, 928 S.W.2d at 461.

After examining the proof adduced at the sentencing hearing, the trial court determined that the appellant had an extensive criminal history. At the time of the instant offense, the twenty-four-year-old appellant was near completion of a probationary term for a four-year sentence he received in 1999 for selling cocaine. Additionally, the appellant's juvenile record consists of numerous offenses, including aggravated burglary, reckless endangerment involving a deadly weapon, and a weapons offense. Significantly, the trial court noted:

I do find that the defendant's activity of criminal behavior is extensive at such a young age. . . . Some of the strong parts are that there appears to be a progression from such an early age. It is unfortunate for the defendant that he begins; then he goes TDY; he is out on TDY; then he goes back to TDY and gets out when he reaches age 18; and a very short period of time he is in this court on a felony conviction. Beginning and observing the progression through the court the Court does find it is an extensive history.

It appears as though that the defendant has not had even a greater history because of the fact that he was incarcerated for a good period of that time.

We agree with the trial court that this history, particularly in one so young, is extensive. See State v. Antray Terrill Morrow, No. W2002-02065-CCA-R3-CD, 2003 WL 22848974, at \*5 (Tenn. Crim. App. at Jackson, Nov. 25, 2003), perm. to appeal denied, (Tenn. 2004); State v. Michael R. Blakely, Jr., No. M2001-01114-CCA-R3-CD, 2003 WL 213780, at \*17 (Tenn. Crim. App. at Nashville, Jan. 31, 2003).

Additionally, the trial court noted that the appellant was serving a probationary sentence at the time of the instant offense. We agree with the trial court that the appellant's commission of an offense before successfully completing his probationary sentence indicates that measures less restrictive than confinement have recently been unsuccessfully applied to the appellant. Accordingly, we find no error in the trial court's decision to deny alternative sentencing.

## 2. Consecutive Sentencing

At the appellant's sentencing hearing, the trial court revoked the appellant's probation for his cocaine offense and ordered the appellant to serve the balance of that sentence in confinement.<sup>3</sup> The trial court further ordered the appellant to serve his sentence for the instant offense consecutively to his service of the sentence for the cocaine offense. On appeal, the appellant contends that the imposition of consecutive sentencing was error.

Initially, we note that "[w]hether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). Tennessee Code Annotated section 40-35-115(b) (2003) contains the discretionary criteria for imposing consecutive sentencing. See also State v. Wilkerson, 905 S.W.2d 933, 936 (Tenn. 1995).

In imposing consecutive sentencing, the trial court again noted the appellant's extensive criminal history, see Tenn. Code Ann. § 40-35-115(b)(2), and that the instant offense was committed while the appellant was on probation for another offense, see Tenn. Code Ann. § 40-35-115(b)(6). We have already concluded that the appellant possessed an extensive criminal history. Additionally, the appellant conceded that he committed the instant offense while still serving a probationary sentence for selling cocaine. Accordingly, we conclude that the trial court did not abuse its discretion in ordering the appellant to serve his sentence for the instant conviction consecutively to the sentence for his sale of cocaine conviction.

### **III. Conclusion**

Finding no reversible error, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE

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<sup>3</sup> The appellant does not challenge this revocation in the instant appeal.